IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 714 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MANUBHAI JIVANBHAI OD

Versus

THE STATE OF GUJARAT

Appearance:

MR BS SUPEHIA for Appellant

Mr.K.P.Raval, Addl.PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 08/05/98

ORAL JUDGEMENT (Soni J.)

Appellant, original accused no.1 in Sessions Case No.86 of 1990, has challenged the order of conviction dated 31.8.91 passed by Additional Sessions Judge, Nadiad, whereby he is held guilty of an offence

punishable under section 302 of I.P.C. and is sentenced to R.I. for life and a fine of Rs.250/-, in default S.I. for eight days. Though he is held guilty of offence punishable under sections 201, 211 and 203 of I.P.C., no separate sentence is passed.

Facts leading to the case of the prosecution are as under:-

Appellant, accused no.1, and his brother, accused no.2, who is released on probation under section 360 of the Code of Criminal Procedure, 1973 ("Code" for short), were labourers with their families at the Kiln of one Ghanshyambhai Merubhai. It appears that they were paid some advance by said Ghanshyambhai. Said Ghanshyambhai was running the kiln with his family and also one Khanabhai Bhavanbhai. On 11.2.90, Kantaben, wife of Ghanshyambhai, enquired for cholakhi (cholakhi is a sort of grass) from one Shivabhai. Shivabhai happened to be the brother of the accused. In view of the reply given by Shivabhai, there was a quarrel. As the quarrel took place, Ghanshyambhai had come and asked the accused and his brothers that if they do not want to work, they may go away. When they were just going away, Bhanabhai Merubhai, brother of Ghanshyambhai, just intercepted them, telling them that they cannot go away without paying back the advance collected by them and it appears that there was some sort of push and pull. It is the case of the prosecution that accused no.1 pulled out six months old child from the custody of her mother Kantaben, wife of Mangalbhai. Catching hold her from legs, he struck her on the ground, as a result of which she died. This was the information conveyed by Ghanshyambhai and it was recorded by Tarapur Police Station at Sl.No.9 at 15.10 hours. Mangalbhai, accused no.2, had also lodged a complaint with Senior Police Sub-Inspector, Cambay Rural, at 17.30 hours. On receipt of the complaint, investigating officer found that complaint by accused no.2 to be false and having found favour with entry no.9, investigated into the matter and on completion of the investigation, submitted the chargesheet against accused in the court of J.M.F.C. at Cambay. The learned J.M.F.C., Cambay, in his turn, committed the case to the court of Sessions at Nadiad.

The learned Additional Sessions Judge framed the charge against the accused. Accused pleaded not guilty and claimed to be tried. The learned Addl. Public Prosecutor led necessary evidence to prove the charge levelled against the accused and on completion of the same, further statements of the accused were recorded. From the tenor of cross-examination of the prosecution witnesses and the further statements, it appears that defence of the accused is of total denial. Accused have

not led any defence evidence. Learned Additional Sessions Judge, after hearing the parties, held the accused no.1 guilty of offence punishable under sec.302 I.P.C. and also under sections 201, 211 and 203 of I.P.C. The learned Judge has also held the accused no.2 guilty of offences punishable under sections 201, 203 and 211 of I.P.C. However, he released him on probation under section 360 of the Code. Accused no.1 has preferred this appeal.

Learned Advocate Mr.Supheia has challenged the conviction on the ground that the learned Judge has erred in believing that the prosecution has proved the case against the accused no.1 beyond reasonable doubt. Mr.Supheia contended that on reading the evidence of the prosecution witnesses, presence of accused no.1 is not established at all. Mr.Supheia further contended that there was no earthly reason for accused no.1 to snatch away the child from the custody of her mother and kill her by striking on the ground for a dispute with Ghanshyambhai. Mr.Supheia contended that the whole of the prosecution story advanced is not only improbable, but also unreasonable and unbelievable. Mr.Supheia, therefore, contended that the appeal should be allowed and the accused be set at liberty forthwith. Mr.Supheia contended that conviction under sections 201,211 and 203 of I.P.C. is also unsustainable in the facts of the case.

Mr.K.P.Raval, learned A.P.P., supports the judgment of the learned Additional Sessions Judge. Mr.Raval contended that on bare reading of evidence of P.W.5 Ratibhai and P.W.6 Rameshbhai, no other evidence is required to establish the guilt of the accused. Evidence of P.W.5 and P.W. 6 is cogent and convincing and proves the charge levelled against the accused. Mr.Raval also contended that in every case, it is not necessary that the prosecution shall establish motive and/or intention. If the facts of the case are glaring and are proved by cogent and acceptable evidence, motive becomes insignificant and, therefore, he contended that the appeal should be dismissed.

Appellant, accused no.2 and their other two brothers Keshubhai and Shivabhai with their family members, were labourers working in the kiln of Ghanshyambhai. Ghanshyambhai had advanced some amount. In the kiln of Ghanshyambhai, Ghanshyambhai, his family members, his sister Savitaben, were also working. In the afternoon, by about 1.00 (13.00 hours), when the accused and their family members were working on the kiln, there appeared to be some dispute or quarrel when Kantaben enquired about chalaki and thereafter it appears that Ghanshyambhai had come. In the course of that dispute, accused no.1 snatched away the child from the custody of

her mother and killed her by striking her on the ground. To prove this fact, prosecution has examined as many as six witnesses, of which four have turned hostile. Those four witnesses are Kantaben, wife of Ghanshyambhai P.W.1; Punabhai Kalabhai P.W.2; Savitaben Merubhai P.W.3 and Ghanshyambhai Merubhai P.W. 4. In the initial complaint given by accused no.2, cause of dispute is shown as enquiry about chalaki by Kantaben P.W. 1. P.W.1 in her evidence has pleaded total ignorance about the persons employed in kiln as well as incident. She also states that she has not referred to accused no.1 as a labourer in their kiln. P.W. 2 has stated in his evidence that he met with the accused and their family members on the way at about 2.00 PM and enquired as to why they are going away early and in reply thereto, they stated that a quarrel has taken place in the kiln. He does not say anything more than than. Savitaben P.W. 3, sister of Ghanshyambhai, has also shown total ignorance about the incident. Then comes the evidence of Ghanshyambhai P.W. 4. However, he pleads ignorance about the incident, as, according to him, he has come at the scene of offence after the child has died.

The learned Judge has relied on evidence of two witnesses, namely, Ratilal P.W. 5 and Rameshbhai P.W.6. P.W.5 Ratilal was working in the kiln of one Bhupatbhai. According to him, when he reached the kiln of Ghanshyambhai, he saw accused, his brothers and their wives and accused no.1 had snatched the child by both the legs from the custody of wife of Mangalbhai. According to him, he told him not to snatch the child. However, accused no.1 snatched the child and struck her on the ground. This Ratilal P.W.5 is working in the kiln of one Bhupatbhai, which is adjoining to that of Ghanshyambhai. P.W. 5 had no reason to go to the kiln of Ghanshyambhai. According to this witness, when accused no.1 held two legs of the child, he has held the hand of accused no.1. He does not refer that Rameshbhai was also present there. P.W.1, P.W.3 and even P.W. 4, who has come later on at the place of incident, have not referred to the presence of Ratilal P.W.5. In the worthy given by P.W.4 to the Police, name of accused no.1 is not disclosed as an offender. In an information conveyed by P.W.4, he has only referred to the threat given by this accused that he will be involved for the death of the child. Question is that when the concerned persons, who are supposed to be present at the scene of offence and were present at the scene of offence do not refer to this witness, how far would it be safe to accept the say of this witness in absence of any convincing corroborative piece of evidence. In our opinion, in absence of any convincing corroborative piece of evidence, evidence of this witness

cannot be accepted.

Prosecution has relied on evidence of P.W.6 Rameshbhai to corroborate the evidence of P.W. 5 Ratilal. Presence of Rameshbhai is also suspicious, as he is not a person working in the kiln of Ghanshyambhai. He does not remember to have stated before the Police that the child was snatched from the custody of a woman. It is not proved beyond reasonable doubt that one standing at the kiln of Bhupatbhai can see properly what happens in the kiln of Ghanshyambhai. This witness has also not stated before the Police that P.W. 5 was present at the place of incident. He had also no knowledge as to why the quarrel took place. Thus, in our opinion, presence of this witness P.W. 6 is also doubtful. Therefore, his evidence, in our opinion, is not cogent and convincing and is a weak evidence. A weak evidence, in our opinion, will not corroborate or give strength to other evidence, which needs some strength by way of corroboration. Therefore, evidence of P.W.5 and P.W. 6 both, in our opinion, ought not to have been accepted by the learned Judge. In our opinion, learned Judge has erred in accepting and relying on the evidence of these two witnesses.

Incident, in our opinion, appears to have occurred, but the cause advanced by accused and complainant P.W. 4 surrounds some mystery. This mystery could have been solved if necessary motive could have been supplied by the prosecution. Motive advanced by the prosecution, in our opinion, does not stand to reason and much less acceptable. Motive advanced is that there was a dispute about chalaki, as a result of which accused and their family members were asked to go away, if they do not want to work. When they were going away, it was stated that they were prevented on the ground that they have not repaid the advance taken by them. It appears that there was push and pull, as a result of which six months old child had fallen and died. There is no dispute by either of the parties, namely, defence and prosecution, that child has died a homicidal death, but it appears that both the parties have tried to exploit the death of the child, instead of honouring and/or respecting the death of a human being. In our opinion, Ghanshyambhai was equally responsible for giving an information to the Police at 15.10 hours and that also does not appear to be complete information. Even if we treat it to be correct, it only reveals that the daughter of Mangalbhai is struck on the ground. Who struck, how struck, why struck, is not disclosed. Even in that entry also, Ghanshyambhai P.W. 4 has not referred to the name of the accused, while accused no.2 in his complaint given

at 17.30 hours has disclosed that a child was snatched from the possession of Kantaben by Bhalabhai, brother of Ghanshyambhai, and the child was handed over to his sister Savitaben; and that Savitaben struck that child on the ground and has killed her. Savitaben is examined as a witness in this case as P.W. 3, but this also appears to be some mysterious version. It is the duty of the prosecution to prove any charge levelled against any of the accused beyond reasonable doubt. Any suspicion or doubt, which is a reasonable one, entitles benefit to the accused. Prosecution has not tried to solve the mystery and resolved the doubt created by two versions at Ex.17 and Ex.30. However, the fact remains that the child has died. In absence of any specific motive supplied by the prosecution, it will be hazardous to act on the evidence of P.W.5 and P.W. 6. We are, therefore, of the opinion that the learned Additional Sessions Judge has erred in accepting the evidence of these two witnesses and holding the accused no.1 guilty of offence punishable under sec.302 I.P.C.

So far as offences under sections 201, 203 and 211 of I.P.C. are concerned, it is not shown by any evidence that the information which constitutes the offence as conveyed by accused no.2 was conveyed at the instance of this accused no.1 and this accused no.1 was a party for conveying the same. This accused is not held guilty for these offences either read with sec.34 or sec.114 of I.P.C., though there was also a charge. Alleged information, which can be said to constitute these offences, was, according to the prosecution, conveyed by accused no.2 and not accused no.1. Therefore, conviction of this accused for the said offences, in our opinion, is also an erroneous one.

In view of the above discussion, the appeal is allowed. The conviction and sentence of the appellant accused no.1 is quashed and set aside. The appellant be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded.
